IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 12TH JANUARY 2007 / 22ND PAUSHA 1928

FAO.No. 112 of 2003()

AS.4/1997 of DISTRICT COURT, PALAKKAD
OS.160/1993 of ADDL.SUB COURT, PALAKKAD

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APPELLANT/RESPONDENT/PLAINTIFF:

GEETHA BHAI, W/O. ARAVINDAKSHAN,
ARIMBANKULANGRA, MANNUR AMSOM.

BY ADV. SRI.N.N.SUGUNAPALAN

RESPONDENT/APPELLANT/DEFENDANT:

A.V. SUBRAMANIA IYER,
S/O. VISWANATHA IYER, ERAMANGALAM GRAMAM
COYALMANNAM AMSOM, ALATHUR TALUK,
PALAKKAD DISTRICT.

BY ADV. SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 12/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

FAO112/2003

ORDER ON I.A.NO.1407 OF 2003 IN F.A.O.112 OF 2003

DISMISSED.

Sd/-

12.1.2007 K.T.SANKARAN, JUDGE

/TRUE COPY/

P.A.TO JUDGE

K.T.SANKARAN, J

F.A.O.No.112 of 2003

Dated this the 12th day of January, 2007

JUDGMENT

The appellant filed O.S.No.160 of 1993 before the Sub Court, Palakkad against the respondent for specific performance of Ext. A1 agreement for sale of 80 cents of land for a consideration of Rs.21,600/-. The suit was decreed by the trial court. On appeal by the defendant, the appellate court set aside the judgment of the trial court and remanded the case to the trial court for fresh disposal. The order of remand is under challenge in this F.A.O.

2. The substantial questions of law raised in the appeal read as follows:

"(i). Is not the principle of one who seeks equity must do equity applicable to this being one for specific performance?

(ii). Has not the Lower Appellate Court erred in not considering Ext. A1 agreement as contingent contract covered by S. 32 of the Contract Act?

(iii). Is not the Lower Appellate Court erroneous in remanding

the matter for fresh disposal when no amendment of pleading or grounds for adducing fresh evidence is made out by the appellant/defendant?"

3. Ext.A1 agreement is dated 24.11.1983. The land which is the subject matter of the agreement was subject to litigation before the Forest Tribunal. When Jendas were put, the defendant filed O.A.No.170/1980 before the Forest Tribunal for a declaration that the land is not a vested forest. The O.A was allowed on 4.12.1982. At the time when Ext. A1 agreement was executed, the order of the Forest Tribunal was not appealed against. The parties apprehended that the Government might file an appeal. It was stipulated in the agreement that the defendant should take steps to remove the Jenda put up by the Forest Department before 31.1.1984 and intimation thereof should be given to the plaintiff. The plaintiff was bound to pay the balance sale consideration and complete the transaction within 15 days thereafter. The parties further agreed that in the event of the Government preferring an appeal against the order of the Forest Tribunal, the plaintiff has to get possession of the property after the High Court disposes of the case in favour of

the defendant. In such a contingency also, the defendant was expected, as per the terms of the agreement, to inform the plaintiff about the disposal of the case and within 15 days, the plaintiff had to pay the balance sale consideration. It was also stipulated in the agreement that if the decision of the High Court were to go against the defendant, he had to inform the same to the plaintiff and the defendant was bound to return the advance amount without interest.

4. On 27.2.1993, the plaintiff sent Ext. A2 notice to the defendant wherein it is stated that on enquiry she came to know that the High Court had passed judgment in favour of the defendant. Ext. A2 notice was received by the defendant on 1.3.1993. The suit was filed on 20.3.1993 for specific performance. On 26.3.1993, Ext. B2 reply was sent by the defendant wherein he disputed the allegations made in the notice and contended that the High Court had not disposed of the appeal.

5. In the plaint, the plaintiff contended that she was ready and willing to perform her part of the contract. In the written statement, the defendant specifically denied these

averments and stated thus: “The allegation that the plaintiff was ready and willing to perform her part of the contract ever since the date of execution of the agreement is denied by this defendant. The plaintiff was never ready and willing to perform her part of the contract.” On 23.7.1996, the husband of the plaintiff was examined as PW1 and he was cross examined. The case was posted to 24.7.1996 for arguments. It is recorded that the case was heard on that day and it was reserved for judgment. On 31.7.1996, the trial court decreed the suit.

6. In spite of the contention raised by the defendant, the trial court did not raise any issue on the question of readiness and willingness of the plaintiff to perform her part of the contract. The cross examination of PW1 would indicate that the contention that the plaintiff was ready and willing to perform her part of the contract was challenged by the defendant. Still no finding was rendered by the trial court on this disputed question of fact.

7. The trial court held that the suit is not barred by limitation. A contention was raised by the defendant that possession of the property was not obtained by the defendant

and therefore the suit is premature. The trial court held that the plaintiff could relinquish a part of her claim and get relief in respect of the other part and on that ground it was held that the plaintiff is entitled to get a decree for specific performance. The appellate court, after considering the facts of the case thought that the contention raised by the defendant/appellant that he did not get sufficient opportunity to adduce evidence is sustainable and that a remand of the case to the trial court is necessary in the facts and circumstances of the case.

8. O.A.No.170 of 1980 was allowed by the Forest Tribunal on 4.12.1982. M.F.A.No.24/84 filed by the custodian before the High Court was allowed and the case was remanded to the Forest Tribunal, by the judgment dated 22.3.1993. The suit was filed on 20.3.1993, before the disposal of the appeal by the High Court. After remand, the Forest Tribunal again allowed the Original Application as per the order dated 9.5.1995. On the date on which the suit was filed, the proceedings before the Forest Tribunal were not over and even the appeal pending before the High Court was not disposed of. However, the contention raised by the plaintiff under Section 12(3) of the

Specific Relief Act was accepted by the trial court and a decree was passed. The learned counsel for the respondent/defendant contended that the finding of the trial court that the plaintiff is entitled to specific performance of part of the contract invoking Section 12(3) is unsustainable as the ingredients of Section 12(3) are not satisfied. The expression "but the court may, at the suit of the other party, direct the party in default to perform specifically", according to the counsel for the respondent applies only when the defendant was in default. He submitted that since the proceedings before the Forest Tribunal did not attain finality on the date of suit, it could not be said that the defendant was in default. He also submitted that the state of affairs as on the date of suit are to be taken into account and that the question of default is to be considered with reference to the date of suit and not the date when evidence was tendered. The court below has not considered these aspects of the matter. The trial court though rendered a finding in favour of the plaintiff did not closely scrutinize the scope and ambit of Section 12(3) of the Specific Relief Act. The learned counsel for the respondent submitted that even when the defendant in a suit for specific

performance did not file written statement, the court is not bound to grant a decree for specific performance. The relief of specific performance is discretionary and the court has to exercise the discretion to decree or not to decree specific performance after considering all the relevant facts and circumstances of the case and the equities arising in the case. The counsel relied on the decision in Thomas P. Abraham v. Aleyamma Abraham (2003(3) KLT 864) wherein it is held :

> "We are of the view, court exists for dispensation of justice. On the mere fact that written statement is not filed or that the defendant has not controverted the averments in the plaint, court is not expected to blindly follow the averment made by the plaintiff and decree the suit. The court will examine whether the averment made by the party is legal and valid and a specific performance decree be granted which is discretionary. Discretion has to be exercised on sound legal principle and not on the weakness of the defendant's case.
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> In a suit for specific performance court has got considerable discretion to grant decree or not, even in a case where no written statement has been filed. Being a discretionary remedy even when no written statement has been filed the Court has got the duty to examine whether suit can be decreed on the averments made in the plaint alone. In a given case plaintiff had failed to comply with the statutory requirements for the grant of decree for specific performance and the suit could be dismissed. The Court is not bound to decree specific performance merely because it is lawful to do so. The discretion

> is however to be exercised on sound legal principle. In other words, being a discretionary remedy the fact that defendant has not filed written statement as such is not a ground for passing an ex parte decree."

The counsel for the respondent/defendant relied on the decision in Bhaskaran Nair v. Habeeb Mohammed (2002 (1) KLT 864) wherein it is held that "the delay in filing the suit, non- enquiry regarding the property that was to be sold and the non-inspection of the same are all matters which go on a long run to show that the plaintiff is not entitled to specific performance."

9. As stated earlier, the crucial aspect to be considered in a suit for specific performance is whether the plaintiff was ready and willing to perform her part of the agreement. This aspect was not at all considered by the trial court. The trial court did not raise proper issues for trial. Evidence of the plaintiff was recorded on 23.7.1996 and the arguments were closed on 24.7.1996. The contention raised by the defendant that no sufficient opportunity was afforded to the defendant to adduce evidence appears to be probable. The trial court did not advert to the cross examination of PW1 challenging the readiness and willingness on the part of the plaintiff to perform

her part of the contract. The trial court did not render any finding on that aspect. The question whether the suit was premature and whether the plaintiff could relinquish any part of her claim as the right itself was not available to exercise relinquishment, as on the date of the suit, was also not properly considered by the trial court. The lower appellate court thought that to secure the ends of justice and for a fair trial, an opportunity should be afforded to the parties to lead evidence and to produce documents, and that the suit is to be disposed of afresh.

10. On the facts arising in this case, the questions of law raised for consideration do not arise at all. I am of the view that the court below was justified in remanding the case to the trial court for fresh disposal.

The FAO lacks merits and it is accordingly dismissed. No order as costs.

K.T.SANKARAN,
JUDGE

csl